

# ORIGINAL



0000147911

## MEMORANDUM

TO: Docket Control

FROM: Steven M. Olea  
Director  
Utilities Division

DATE: September 06, 2013

RE: IN THE MATTER OF THE APPLICATION OF IONEX COMMUNICATIONS NORTH, INC. D/B/A BIRCH COMMUNICATIONS FOR APPROVAL OF A CERTIFICATE OF CONVENIENCE AND NECESSITY TO PROVIDE RESOLD LOCAL EXCHANGE, RESOLD LONG DISTANCE, FACILITIES-BASED LONG DISTANCE AND FACILITIES BASED LOCAL EXCHANGE TELECOMMUNICATIONS SERVICES. (DOCKET NO. T-03864A-13-0051)

Attached is the Staff Report for the above referenced application. The Applicant is seeking Commission approval to provide the following services:

- Resold Local Exchange Services
- Resold Long Distance Services
- Facilities-Based Long Distance Services
- Facilities-Based Local Exchange Services

Staff is recommending approval of the application with conditions.

SMO:LLM:tdp\ML

Originator: Lori Morrison

Attachment: Original and Thirteen Copies

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SERVICE LIST FOR: IONEX COMMUNICATIONS NORTH, INC. D/B/A BIRCH  
COMMUNICATIONS

DOCKET NO.: T-03864A-13-0051

Ms. Joan Burke  
1650 North First Avenue  
Phoenix, Arizona 85003

STAFF REPORT  
UTILITIES DIVISION  
ARIZONA CORPORATION COMMISSION

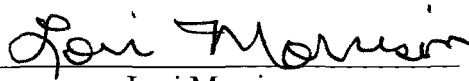
IONEX COMMUNICATIONS NORTH, INC. D/B/A BIRCH COMMUNICATIONS  
DOCKET NO. T-03864A-13-0051

IN THE MATTER OF THE APPLICATION OF IONEX COMMUNICATIONS NORTH, INC.  
D/B/A BIRCH COMMUNICATIONS FOR APPROVAL OF A CERTIFICATE OF  
CONVENIENCE AND NECESSITY TO PROVIDE RESOLD LOCAL EXCHANGE,  
RESOLD LONG DISTANCE, FACILITIES-BASED LONG DISTANCE AND FACILITIES-  
BASED LOCAL EXCHANGE TELECOMMUNICATIONS SERVICES.

SEPTEMBER 06, 2013

## STAFF ACKNOWLEDGMENT

The Staff Report for Ionex Communications North, Inc. d/b/a Birch Communications, Docket No. T-03864A-13-0051, was the responsibility of the Staff member listed below. Lori Morrison was responsible for the review and analysis of the application for a Certificate of Convenience and Necessity to provide resold local exchange, resold long distance, facilities-based long distance, and facilities-based local exchange telecommunications services and petition for a determination that its proposed services should be classified as competitive.

A handwritten signature in cursive script, reading "Lori Morrison", is positioned above a horizontal line.

Lori Morrison  
Utilities Consultant

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## **1. INTRODUCTION**

On March 5, 2013, Ionex Communications North, Inc. d/b/a Birch Communications (“Birch” or “Applicant”) filed an application for a Certificate of Convenience and Necessity (“CC&N”) to provide resold long distance, facilities-based long distance, resold local exchange, and facilities-based local exchange telecommunications services on a statewide basis in Arizona. The Applicant petitioned the Arizona Corporation Commission (“ACC” or “Commission”) for a determination that its proposed services should be classified as competitive.

Staff’s review of this application addresses the overall fitness of the Applicant to receive a CC&N. Staff’s analysis also considers whether the Applicant’s services should be classified as competitive, if the Applicant’s initial rates are just and reasonable and if approval of the Applicant’s CC&N should be conditioned.

## **2. REQUESTED SERVICES**

Birch’s CC&N application requested statewide authority to provide resold and facilities-based long distance and resold and facilities-based local exchange services telecommunications services. Staff reviewed the Applicant’s amended tariff that showed the proposed rates, charges, prices, terms and conditions for service to residential and business customers.

## **3. TECHNICAL CAPABILITY TO PROVIDE THE REQUESTED SERVICES**

The Applicant is wholly owned by Birch Telecom, Inc., which is wholly owned by Birch Communications, Inc. All of the voting and equity interest in Birch Communications, Inc. is owned by Birch Communications Holdings, Inc. (“Birch Holdings”).

Birch currently has authority to provide local exchange and interexchange services in twelve (12) jurisdictions.<sup>1</sup> The Applicant’s top executives, listed in Attachment A of the application, have more than 100 total years of telecommunications experience. Based on the above information, Staff believes the Applicant possesses the technical capabilities to provide the services it is requesting the authority to provide in Arizona.

## **4. FINANCIAL CAPABILITY TO PROVIDE THE REQUESTED SERVICES**

In section (B-3) of the CC&N application, Birch stated that it would rely on the financial resources of its ultimate parent company, Birch Communications Holdings, Inc. Pursuant to a protective agreement, Birch submitted audited financials for the periods ending December 31, 2011 and December 31, 2012. For the period ending December 31, 2011, Birch Communications, Inc. reported total assets of \$71,418,511; equity of negative \$22,754,953; and net income of negative \$5,444,912. For the period ending December 31, 2012, Birch Communications, Inc. reported total assets of \$63,272,065; equity of negative \$31,834,832; and

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<sup>1</sup> Colorado, Iowa, Minnesota, Montana, Nebraska, North Dakota, New Mexico, Oregon, South Dakota, Utah, Washington, and Wyoming.

net income of \$2,922,293.

## **5. ESTABLISHING RATES AND CHARGES**

The Applicant would initially provide service in areas where an ILEC, along with various competitive local exchange carriers ("CLECs") and interexchange carriers are providing telephone service. Therefore, the Applicant would have to compete with those providers in order to obtain subscribers to its services. The Applicant would be a new entrant and would face competition from both an incumbent provider and other competitive providers in offering service to its potential customers. Therefore, the Applicant would generally not be able to exert market power. Thus, the competitive process should result in rates that are just and reasonable.

Both an actual rate and a maximum rate may be listed for each competitive service offered. The rate charged for a service may not be less than the Applicant's total service long-run incremental cost of providing the service pursuant to A.A.C. R14-2-1109.

The rates proposed by this filing are for competitive services. In general, rates for competitive services are not set according to rate of return regulation. In section (B-4) of its application, the Applicant provided a net book value or fair value rate base at the end of its first 12 months of operation estimated to be zero (\$0).

Birch submitted an amended Arizona Tariff No. 1 to support its application. Staff has reviewed these rates and believes they are comparable to the rates charged by CLECs, ILECs and major long distance carriers operating in the State of Arizona. The Applicant's rates and charges are also comparable to the rates and charges the Applicant charges in other state jurisdictions. The rate to be ultimately charged by the Applicant will be heavily influenced by the market. Therefore, while Staff considered the fair value rate base information submitted by the Applicant, the fair value rate base information provided was not given substantial weight in this analysis.

## **6. LOCAL EXCHANGE CARRIER SPECIFIC ISSUES**

Issues related to the provision of Local Exchange service are discussed below.

### *6.1 Number Portability*

The Commission has adopted rules to address number portability in a competitive telecommunications services market. Local exchange competition may not be vigorous if customers, especially business customers, must change their telephone numbers to take advantage of a CLEC's service offerings. Consistent with federal laws, federal rules and A.A.C. R14-2-1308(A), the Applicant shall make number portability available to facilitate the ability of a customer to switch between authorized local carriers within a given wire center without changing their telephone number and without impairment to quality, functionality, reliability or convenience of use.

## *6.2 Provision Of Basic Telephone Service And Universal Service*

The Commission has adopted rules to address universal telephone service in Arizona. A.A.C. R14-2-1204(A) indicates that all telecommunications service providers that interconnect into the public switched network shall provide funding for the Arizona Universal Service Fund ("AUSF"). The Applicant will make the necessary monthly payments required by A.A.C. R14-2-1204(B).

## *6.3 Quality Of Service*

Staff believes that the Applicant should be ordered to abide by the quality of service standards that were approved by the Commission for Qwest (f/k/a USWC) in Docket No. T-01051B-93-0183 (Decision No. 59421). Because the penalties developed in that docket were initiated because Qwest's level of service was not satisfactory and the Applicant does not have a similar history of service quality problems, Staff does not recommend that those penalties apply to the Applicant. In the competitive market that the Applicant wishes to enter, the Applicant generally will have no market power and will be forced to provide a satisfactory level of service or risk losing its customers. Therefore, Staff believes that it is unnecessary to subject the Applicant to those penalties at this time.

## *6.4 Access To Alternative Local Exchange Service Providers*

Staff expects that there will be new entrant providers of local exchange service who will install the plant necessary to provide telephone service to, for example, a residential subdivision or an industrial park much like existing local exchange companies do today. There may be areas where the Applicant installs the only local exchange service facilities. In the interest of providing competitive alternatives to the Applicant's local exchange service customers, Staff recommends that the Applicant be prohibited from barring access to alternative local exchange service providers who wish to serve such areas. This way, an alternative local exchange service provider may serve a customer if the customer so desires. Access to other providers should be provided pursuant to the provisions of the 1996 Telecommunications Act, the rules promulgated there under and Commission rules on interconnection and unbundling.

## *6.5 911 Service*

The Commission has adopted rules to address 911 and E911 services in a competitive telecommunications services market. The Applicant has certified that in accordance with A.A.C. R14-2-1201(6)(d) and Federal Communications Commission 47 CFR Sections 64.3001 and 64.3002, it will provide all customers with 911 and E911 service, where available, or will coordinate with ILECs and emergency service providers to provide 911 and E911 service.

## *6.6 Custom Local Area Signaling Services*

Consistent with past Commission decisions, the Applicant may offer Caller ID provided that per call and line blocking, with the capability to toggle between blocking and unblocking the



transmission of the telephone number, are provided as options to which customers could subscribe with no charge. Also, Last Call Return service that will not return calls to telephone numbers that have the privacy indicator activated, indicating that the number has been blocked, must be offered.

## **7. REVIEW OF COMPLAINT INFORMATION**

The Applicant states that it has neither had an application for service denied, nor had its authority to provide service revoked in any jurisdiction. Staff did not find any instances of denied applications or revocation of authority to provide service. The Applicant indicated in the application that neither it nor any of its officers, directors or partners have been or are currently involved any formal or informal complaint proceedings pending before any state or federal regulatory commission, administrative agency or law enforcement agency. Staff has found no instances of any formal or informal complaint proceedings pending before any state or federal regulatory commission, administrative agency or law enforcement agency involving the Applicant or any of its officers, directors or managers.

The Applicant has currently been granted authority in twelve (12) other jurisdictions as discussed above. Staff contacted seven (7) other jurisdictions<sup>2</sup> where the Applicant is currently authorized to provide service to verify certification to provide service and to inquire about complaints. All seven states advised that the Applicant was indeed authorized to provide service in their jurisdiction and that no complaints had been received about the Applicant.

The Corporations Division has indicated that Ionex Communications North, Inc. d/b/a Birch Communications is in good standing. The Consumer Services Section reports no complaints have been filed in Arizona from January 1, 2010 to March 20, 2013.

A search of the Federal Communications Commission's ("FCC") website found that there have been no complaints against the Applicant, which currently provides services in twelve (12) jurisdictions. Of the Applicant's 12 affiliates, six have had a total of 16 complaints filed against them, an average of less than one complaint per year per affiliate from 2010 through 2012. The complaints related to inappropriate carrier changes resulting from incorrect third party verifications and errors when affiliates acquired customer bases from other companies. The remaining 6 affiliates had ~~no~~ complaints filed against them and there have been no complaints filed against the Applicant or any of its affiliates in 2013. X

## **8. COMPETITIVE SERVICES ANALYSIS**

The Applicant has petitioned the Commission for a determination that the services it is seeking to provide should be classified as competitive.

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<sup>2</sup> Colorado, Iowa, Minnesota, Montana, Nebraska, Oregon and Utah.

*8.1 Competitive Services Analysis For Local Exchange Services*

**8.1.1 A description of the general economic conditions that exist, which makes the relevant market for the service one that, is competitive.**

The statewide local exchange market that the Applicant seeks to enter is one in which a number of CLECs have been authorized to provide local exchange service in areas previously served only by ILECs. At locations where ILECs provide local exchange service, the Applicant will be entering the market as an alternative provider of local exchange service and, as such, will have to compete with those existing companies in order to obtain customers. In areas where ILECs do not serve customers, the Applicant may have to convince developers to allow it to provide service to their developments. The areas served by CenturyLink that the Applicant seeks to enter are served by wireless carriers and Voice over the Internet Protocol ("VoIP") service providers. This may also be the case in areas served by independent ILECs.

**8.1.2 The number of alternative providers of the service.**

CenturyLink and various independent ILECs provide local exchange service in the State. CLECs and local exchange resellers are also providing local exchange service. The areas served by CenturyLink that the Applicant seeks to enter are served by wireless carriers and VoIP service providers. This may also be the case in portions of the independent ILECs' service territories.

**8.1.3 The estimated market share held by each alternative provider of the service.**

CenturyLink and CLECs are the primary providers of local exchange service in CenturyLink's Service territories. Independent ILECs are the primary providers of local exchange service in their service territories.

**8.1.4 The names and addresses of any alternative providers of the service that are also affiliates of the Applicant, as defined in A.A.C. R14-2-801.**

Birch does not have any affiliates that are alternative providers of local exchange service in Arizona.

**8.1.5 The ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms and conditions.**

ILECs have the ability to offer the same services that the Applicant has requested the authority to provide in their respective service territories. Similarly, many of the CLECs, local exchange service resellers, wireless carriers and VoIP service providers also offer substantially the same services.

**8.1.6 Other indicators of market power, which may include growth and shifts in market share, ease of entry and exit, and any affiliation between and among alternative providers of the service(s).**

The local exchange service market is:

- a. One in which ILECs own networks that reach nearly every residence and business in their service territories. Competition exists in most urban markets, but to a lesser degree in rural areas of the state.
- b. One in which new entrants will be dependent upon ILECs and other CLECs:
  1. To terminate traffic to customers.
  2. To provide essential local exchange service elements until the entrant's own network has been built.
  3. For interconnection.
- c. One in which existing ILECs and CLECs have had an existing relationship with their customers that the Applicant will have to overcome if it wants to compete in the market and one in which the Applicant will not have a history in the Arizona local exchange service market.
- d. One in which the Applicant will not have the capability to adversely affect prices or restrict output to the detriment of telephone service subscribers.

**8.2 Competitive Services Analysis For Interexchange Services**

**8.2.1 A description of the general economic conditions that exist, which makes the relevant market for the service one that is competitive.**

The statewide interexchange market that the Applicant seeks to enter is one in which numerous facilities-based interexchange carriers and resellers of interexchange service have been authorized to provide service throughout the State. The market the Applicant seeks to enter is also served by wireless carriers and VoIP providers. The Applicant will be a new entrant in this market and, as such, will have to compete with those existing companies in order to obtain customers.

**8.2.2 The number of alternative providers of the service.**

There are a large number of facilities-based interexchange carriers and resellers providing interexchange service throughout the State. The market the Applicant seeks to enter is also served by wireless carriers and VoIP service providers.

**8.2.3 The estimated market share held by each alternative provider of the service.**

Facilities-based interexchange carriers, interexchange service resellers, independent ILECs, CLECs, wireless carriers and VoIP providers all hold a portion of the interexchange market.

**8.2.4 The names and addresses of any alternative providers of the service that are also affiliates of the telecommunications Applicant, as defined in A.A.C. R14-2-801.**

Birch does not have any affiliates that are alternative providers of interexchange service in Arizona.

**8.2.5 The ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms and conditions.**

Both facilities-based interexchange carriers and interexchange service resellers have the ability to offer the same services that the Applicant has requested in their respective service territories. Similarly, many of the ILECs and CLECs offer similar interexchange services. The market the Applicant seeks to enter is also served by wireless carriers and VoIP service providers.

**8.2.6 Other indicators of market power, which may include growth and shifts in market share, ease of entry and exit, and any affiliation between and among alternative providers of the service(s).**

The interexchange service market is:

- a. One with numerous competitors and limited barriers to entry.
- b. One in which established interexchange carriers have had an existing relationship with their customers that the new entrants will have to overcome if they want to compete in the market.
- c. One in which the Applicant will not have the capability to adversely affect prices or restrict output to the detriment of telephone service subscribers.
- d. One in which the share of the market held by wireless carriers has increased over time, while that held by wireline carriers has declined.

## 9. RECOMMENDATIONS

The following sections contain the Staff recommendations on the application for a CC&N and the Applicant's petition for a Commission determination that its proposed services should be classified as competitive.

### *9.1 Recommendations on the Application for a CC&N*

Staff recommends that Applicant's application for a CC&N to provide intrastate telecommunications services, as listed in this Report, be granted. In addition, Staff further recommends:

1. That the Applicant complies with all Commission Rules, Orders and other requirements relevant to the provision of intrastate telecommunications services;
2. That the Applicant abides by the quality of service standards that were approved by the Commission for Qwest in Docket No. T-01051B-93-0183;
3. That the Applicant be prohibited from barring access to alternative local exchange service providers who wish to serve areas where the Applicant is the only provider of local exchange service facilities;
4. That the Applicant be required to notify the Commission immediately upon changes to the Applicant's name, address or telephone number;
5. That the Applicant cooperate with Commission investigations including, but not limited to customer complaints;
6. The rates proposed by this filing are for competitive services. In general, rates for competitive services are not set according to rate of return regulation. The Applicant provided a net book value or fair value rate base at the end of its first 12 months of operation estimated to be zero (\$0). Staff has reviewed the rates to be charged by the Applicant and believes they are just and reasonable as they are comparable to other providers offering service in Arizona and comparable to the rates the Applicant charges in other jurisdictions. The rate to be ultimately charged by the Applicant will be heavily influenced by the market. Therefore, while Staff considered the fair value rate base information submitted by the Applicant, the fair value information provided was not given substantial weight in this analysis;
7. That the Applicant offer Caller ID with the capability to toggle between blocking and unblocking the transmission of the telephone number at no charge;
8. That the Applicant offer Last Call Return service that will not return calls to telephone numbers that have the privacy indicator activated;

9. That the Commission authorize the Applicant to discount its rates and service charges to the marginal cost of providing the services;

Staff further recommends that the Applicant be ordered to comply with the following. If it does not do so, the Applicant's CC&N shall be null and void, after due process.

1. The Applicant shall docket a conforming tariff for each service within its CC&N within 365 days from the date of an Order in this matter or 30 days prior to providing service, whichever comes first;
2. The Applicant shall notify the Commission through a compliance filing within 30 days of the commencement of service to end-user customers; and
3. The Applicant shall abide by the Commission adopted rules that address Universal Service in Arizona. A.A.C. R14-2-1204(A) indicates that all telecommunications service providers that interconnect into the public switched network shall provide funding for the Arizona Universal Fund. The Applicant will make the necessary monthly payments required by A.A.C. R14-2-1204 (B).

*9.2 Recommendation on the Applicant's Petition To Have Its Proposed Services Classified As Competitive*

Staff believes that the Applicant's proposed services should be classified as competitive. There are alternatives to the Applicant's services. The Applicant will have to convince customers to purchase its services, and the Applicant has no ability to adversely affect the local exchange or interexchange service markets. Therefore, the Applicant currently has no market power in the local exchange or interexchange service markets where alternative providers of telecommunications services exist. Staff therefore recommends that the Applicant's proposed services be classified as competitive.